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Supreme Court, U.S.
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No. 96-8653

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

KEVIN D. GRAY,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the introduction of a non-testifying codefendant's inculpatory statement, which is redacted to exclude the names of all those involved in the crime by using the words "deleted" and "deletion," comport with a defendant's rights under the Confrontation Clause of the Sixth Amendment where the redacted statement does not expressly implicate the defendant and the jury is instructed to consider the statement only against the co-defendant?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL PROVISION	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT:	
THIS COURT SHOULD DENY REVIEW BECAUSE THE DECISION OF THE LOWER COURT WAS CORRECT	7
CONCLUSION	15
APPENDIX	1a - 5a

TABLE OF CITATIONS

Cases

Bruton v. United States, 391 U.S. 123 (1968) . . . 7, passim

Clark v. Maggio, 737 F.2d 471 (5th Cir. 1984), *cert. denied*, 470 U.S. 1055 (1985) . . . 10

Commonwealth v. Rawls, 419 A.2d 109 (Pa. Super. 1980) . . . 13

Commonwealth v. Sanford, 470 A.2d 998 (Pa. 1984) . . . 10

Foster v. United States, 548 A.2d 1370 (D.C. 1988) . . . 10

Gray v. State, 107 Md. App. 311, 667 A.2d. 983 (1995) . . . 2

Harris v. State, 462 S.E.2d 425 (Ga. 1995) . . . 13

Page

Hodges v. Rose, 570 F.2d 643
(6th Cir.), *cert. denied*,
436 U.S. 909 (1978) 10

Parker v. Randolph, 442 U.S. 62 (1979) 14

People v. Cruz, 521 N.E.2d 18 (Ill.),
cert. denied, 488 U.S. 869 (1988) 10

People v. Fletcher, 917 P.2d 187 (Ca. 1996) 10

People v. Khan, 613 N.Y.S.2d 198 (1994) 10

People v. Sutter, 556 N.Y.S.2d 959 (1990) 10

Richardson v. Marsh,
481 U.S. 200 (1987) . . . . . 7, passim

Smith v. United States,
561 A.2d 468 (D.C. 1989) 10

State v. Gray, 344 Md. 417, 687 A.2d 660 (1997) . . . 1

State v. Craney, 662 A.2d 899 (Me. 1995) 9

State v. Johnson, 321 S.E.2d 510 (N.C. 1984) . . . 10

United States v. Benitez,
920 F.2d 1080 (2d Cir. 1990) 9

United States v. Briscoe, 896 F.2d 1476
(7th Cir.), *cert. denied*,
498 U.S. 863 (1990) 13

United States v. Burke, 700 F.2d 70
(2d Cir.), *cert. denied*,
464 U.S. 816 (1983) 10

United States v. Donahue, 948 F.2d 438
(8th Cir. 1991), *cert. denied*,
503 U.S. 976 (1992) 13

United States v. Espinoza-Saenez,
862 F.2d 526 (5th Cir. 1988) 9

Page

United States v. Gonzales,
749 F.2d 1329 (9th Cir. 1984) 9

United States v. Gonzalez,
555 F.2d 308 (2d Cir. 1977) 10

United States v. Hoac, 990 F.2d 1099
(9th Cir. 1993), *cert. denied*,
510 U.S. 1120 (1994) 10

United States v. Long, 900 F.2d 1270
(8th Cir. 1990) 10

United States v. Pondegraph, 791 F.2d 1462
(11th Cir.), *cert. denied*,
479 U.S. 869 (1986) 10

United States v. Strickland,
935 F.2d 822 (7th Cir.), *cert. denied*,
502 U.S. 917 (1991) 9

United States v. Van Hemelryck, 945 F.2d 1493
(11th Cir. 1991) 10

United States v. Vogt, 910 F.2d 1184
(4th Cir. 1990), *cert. denied*,
498 U.S. 1083 (1991) 9

United States v. Washington, 952 F.2d 1402
(D.C. Cir. 1991), *cert. denied*,
503 U.S. 1009 (1992) 13

United States v. Williams,
936 F.2d 698 (2d Cir. 1991) 9

Zafiro v. United States, 113 S. Ct. 933 (1993) . . 12

Constitutional Provisions

United States Constitution:

Amendment VI 2

Page

Statutes

United States Code:

Title 28, § 1257 2

CONTENTS OF APPENDIX

Transcript of Proceedings dated
June 17, 1994 in the Circuit Court
for Baltimore City - Court's ruling on
Gray's *Bruton* motion . . . . . 1a - 5a

No. 96-8653

IN THE

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KEVIN D. GRAY,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

Respondent, State of Maryland, respectfully requests that this Court deny the petition for writ of certiorari of Petitioner, Kevin D. Gray.

OPINIONS BELOW

The reported opinion of the Court below, *State of Maryland v. Kevin D. Gray*, 344 Md. 417, 687 A.2d 660 (1997), is reproduced as an appendix to the petition for writ of certiorari. (Pet. for Cert. App. 1-23). The reported opinion of the Court of Special Appeals of

Maryland, *Gray v. State*, 107 Md. App. 311, 667 A.2d. 983 (1995), also is reproduced as an appendix to the petition for writ of certiorari. (Pet. for Cert. App. 24-46). The opinion of the Circuit Court for Baltimore City, Maryland, is reproduced in Appendix A herein. (1a-5a).

STATEMENT OF JURISDICTION

Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a).[1]

CONSTITUTIONAL PROVISION

United States Constitution, Amendment VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Six young men beat Stacey Williams to death on November 10, 1993. (Pet. for Cert. App. 1). Anthony Bell, one of the participants, gave a written statement to the police implicating himself, Gray, and another individual known as "Tank" in Williams's death. (*Id.*). These three individuals were the only persons identified

[1] Gray cites § 1257(3), the predecessor to § 1257(a).

by name as having been involved in the beating. (*Id.* at 2).

Gray and Bell were scheduled to be tried jointly. (*Id.*). Prior to trial, Gray moved to exclude from evidence the statement of Bell or, in the alternative, to sever his trial from Bell's. (*Id.*). In denying the severance motion, the court ruled as follows:

> All right. It seems to me in that light, that there is not a difficulty here with a statement which involves two people where we redact the name of the defendant who is making the motion, that there's going to be this compelling implication to the jury that the name that's been redacted or left out must be the name of the co-defendant [Gray].
>
> To the contrary, I think that where you've got group activity and the evidence here is, apparently, going to be that there were at least five, and maybe as many as six men involved in this assault on the victim, to redact this statement, it seems to me, will not unduly prejudice Mr. Gray.
>
> It seems to me that this statement can be sanitized in about three different spots so as to remove the names of Tank and Mr. Gray and the jury will not be left with the unavoidable inference or implication that the person Mr. Bell is referring to in the statement is Mr. Gray.

(1a-2a). Prior to the admission of the redacted statement into evidence, and again in its jury instructions at the close of the evidence, the court admonished the jury to consider Bell's statement as

evidence against Bell only, and not against Gray. (Pet. for Cert. App. 18).

When the statement was read into evidence by the detective who had interrogated Bell, the words "deletion" and "deleted" were used interchangeably in place of the redacted names of Gray and the other named individual. (*Id.* at 3). Bell's statement, as it was read aloud to the jury, was as follows:

> Question, what can you tell me about the beating of Stacey Williams that occurred on 10, November, 1993?
>
> Answer, an argument broke out between *deletion* and Stacey in the 500 block of Louden Avenue. Stacey got smacked and then ran onto Wildwood Parkway. Me, *deleted*, and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up, we walked him back to Louden Avenue. I then walked over and used the phone, Stacey and the others walked down Louden.
>
> Question, when Stacey was beaten on Wildwood Parkway, how was he beaten?
>
> Answer, hit, kicked.
>
> Question, who hit and kicked Stacey?
>
> Answer, I hit Stacey. He was kicked, but I don't know who kicked him.
>
> Question, who was in the group that beat Stacey?
>
> Answer, me, *deleted*, *deleted*, and a few other guys.
>
> Question, do you know the other guy's name?

> Answer, *deleted*, *deleted*, and me. I don't remember who was out there.
>
> Question, did anyone pick Stacey up and drop him to the ground?
>
> Answer, no when I was there.
>
> Question, what was the argument over between Stacey and *deleted*?
>
> Answer, some money that Stacey owed *deleted*.
>
> Question, how many guys were hitting on Stacey?
>
> Answer, about six guys.
>
> Question, do you have a black jacket with Park Heights written on the back?
>
> Answer, yea.
>
> Question, who else has these jackets?
>
> Answer, *deletion*.
>
> Question, after reading this statement, would you sign it?
>
> Answer, yes. He then signed it.

(*Id.* at 17-18). The copy of the statement admitted into evidence had blank white spaces where the names once appeared. (*Id.* at 3).

An eyewitness testified at trial that she saw Gray, Tank, and several other individuals chase the victim down the street immediately prior to the beating. (*Id.* at 2). Another witness testified that Tank punched Williams several times and that Gray and Tank picked the victim up

and dropped him on his head onto the sidewalk repeatedly. (*Id.*). Gray testified in his own defense and claimed to have been speaking to his girlfriend on a nearby pay phone at the time of the beating. (*Id.* at 3). Gray called other witnesses to support his claim that he was not involved in the beating. (*Id.*). Bell did not testify at the joint trial. (*Id.*). The jury found Gray guilty of involuntary manslaughter. (*Id.*).

Gray's conviction was affirmed by the Court of Special Appeals of Maryland on December 4, 1995. (*Id.* at 4, 24). The intermediate appellate court held that there existed a "substantial risk" that the jury would consider the confession as evidence of his guilt because the use of the words "deleted" and "deletion" was insufficient to make the statement nonincriminating as to Gray. (*Id.* at 41-42). Adopting a "contextual linkage" analysis, the court concluded that Gray's role in the crime was "clearly demonstrated" by his codefendant's confession, "rendering it facially incriminating and constitutionally violative." (*Id.* at 42).

The State of Maryland filed a petition for writ of certiorari to the Court of Appeals of Maryland, which was granted on April 17, 1996. On January 15, 1997, the Court of Appeals of Maryland reversed the judgment of the Court of Special Appeals. (*Id.* at 21). Maryland's

highest court rejected the "contextual" or "evidentiary linkage" analysis employed by the intermediate appellate court and adopted instead the "facial implication" doctrine, holding that "a Bruton violation occurs when a codefendant's confession, either facially, or by compelling and inevitable inference, inculpates a nonconfessing defendant." (*Id.* at 15, 20). Otherwise, the court stated, the general and strong presumption that jurors follow their instructions is not overcome. (*Id.* at 16).

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD DENY REVIEW BECAUSE THE DECISION OF THE LOWER COURT WAS CORRECT.

This Court should deny Gray's petition because the decision of the Court of Appeals of Maryland follows logically in the footsteps of *Bruton v. United States*, 391 U.S. 123, 135-36 (1968), and *Richardson v. Marsh*, 481 U.S. 200 (1987). Maryland's highest court correctly concluded that the introduction of a non-testifying codefendant's inculpatory statement, which was redacted to exclude the names of all those involved in the crime by using the words "deleted" and "deletion," comported with Gray's rights under the Confrontation Clause of the Sixth Amendment because the redacted statement did not

expressly implicate Gray and the jury was instructed not to consider the statement as evidence of Gray's guilt.

At issue in *Bruton* was the admission of a co-defendant's confession naming the defendant as his accomplice. 391 U.S. at 124. This Court noted the substantial risk that the jury would consider the incriminating confession against the confessor's co-defendant, notwithstanding the trial court's instructions to the jury to disregard the confession in determining Bruton's guilt and to consider it as competent evidence only against the co-defendant-confessor. *Id.* at 135-36.

Richardson v. Marsh limited *Bruton* to situations in which facially incriminating statements made by co-defendants are used at trial. In *Richardson*, a co-defendant's confession was redacted to eliminate not only the defendant's name, but any reference to her existence. *Id.* at 211. This Court held that the admission of the confession, coupled with the proper limiting instruction, did not violate Marsh's right of confrontation because the confession did not name Marsh as a perpetrator of the crime nor indicate that she was in any way involved in the crime. *Id.* Thus, the confession in *Richardson v. Marsh* was determined not to be "facially incriminating," as it was in *Bruton*, but, rather, only "inferentially incriminating." *Id.* at 208. In such instances, unlike

confessions which specifically reference the defendant's complicity in the crime, as in *Bruton*, limiting instructions by the trial court were likely to be successful in precluding the jury from inferring the guilt of the defendant from the co-defendant's confession. *Id.*

As Petitioner points out, there is a split of authority among federal and state courts on whether redacting a nontestifying co-defendant's confession by replacing references to the defendant's name with a "symbol or neutral pronoun" avoids violation of a defendant's rights under the Confrontation Clause. Some courts take the position that a redacted confession, in which the name of the defendant has been replaced with symbols or neutral pronouns, is admissible provided that the statement, standing alone, does not connect the defendant to the crime. *See, e.g., United States v. Williams*, 936 F.2d 698, 701 (2d Cir. 1991); *United States v. Strickland*, 935 F.2d 822, 825 (7th Cir.), *cert. denied*, 502 U.S. 917 (1991); *United States v. Benitez*, 920 F.2d 1080, 1087 (2d Cir. 1990); *United States v. Vogt*, 910 F.2d 1184, 1192 (4th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991); *United States v. Espinoza-Saenez*, 862 F.2d 526, 534 (5th Cir. 1988); *United States v. Gonzales*, 749 F.2d 1329, 1334 (9th Cir. 1984); *State v.*

Craney, 662 A.2d 899, 902 (Me. 1995); *People v. Sutter*, 556 N.Y.S.2d 959, 959 (1990); *Commonwealth v. Sanford*, 470 A.2d 998, 439-440 (Pa. 1984).

Other courts embrace the "contextual linkage" approach, which requires consideration of evidence extrinsic to the confession in determining whether it directly incriminates the non-confessing defendant. *See, e.g., United States v. Hoac*, 990 F.2d 1099, 1107 (9th Cir. 1993), *cert. denied*, 510 U.S. 1120 (1994); *United States v. Van Hemelryck*, 945 F.2d 1493, 1502 (11th Cir. 1991); *United States v. Long*, 900 F.2d 1270, 1280 (8th Cir. 1990); *United States v. Pendegraph*, 791 F.2d 1462, 1465 (11th Cir.), *cert. denied*, 479 U.S. 869 (1986); *Clark v. Maggio*, 737 F.2d 471, 477 (5th Cir. 1984), *cert. denied*, 470 U.S. 1055 (1985); *United States v. Burke*, 700 F.2d 70, 85 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); *Hodges v. Rose*, 570 F.2d 643, 647 (6th Cir.), *cert. denied*, 436 U.S. 909 (1978); *United States v. Gonzalez*, 555 F.2d 308, 316 (2d Cir. 1977); *People v. Fletcher*, 917 P.2d 187, 197 (Ca. 1996); *Smith v. United States*, 561 A.2d 468, 473-74 (D.C. 1989); *Foster v. United States*, 548 A.2d 1370, 1378-79 (D.C. 1988); *People v. Cruz*, 521 N.E.2d 18, 22-23 (Ill.), *cert. denied*, 488 U.S. 869 (1988); *People v. Khan*, 613 N.Y.S.2d 198, 203-04 (1994); *State v. Johnson*, 321 S.E.2d 510, 513 (N.C. 1984).

The "facial implication" doctrine, adopted by the Court of Appeals of Maryland, is the better reasoned approach and the one which follows directly from this Court's decisions in *Bruton* and *Richardson*. In *Richardson*, this Court discussed the hazards of extending the holding of *Bruton* to confessions that incriminate nondeclarant defendants only when considered in the context of other evidence introduced at the joint trial. First, whereas facial incrimination is usually curable by redaction that eliminates references to co-participants, there may be no effective way to redact a confession that is incriminating to the non-confessing co-defendant only when tied to other evidence. *Richardson*, 481 U.S. at 209.

Second, in ruling on motions to exclude the confession or to sever the trials, the trial judge would be burdened with the task of considering not only the confession itself but also other evidence which typically will not yet have been presented. *Id.* It would often be impossible for a trial judge to predict the admissibility of a confession in advance of the trial. *Id.*

Third, extending the rule of *Bruton* to confessions which are not facially incriminating would result in fewer joint trials, thereby requiring "that prosecutors bring separate proceedings, presenting the same evidence

again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand." *Id.* at 210. As this Court stated in *Zafiro v. United States*, 113 S. Ct. 933, 937 (1993):

> There is a preference in the federal system for joint trials of defendants who are tried together. Joint trials 'play a vital role in the criminal justice system.' They promote efficiency and 'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.' For these reasons we have repeatedly approved of joint trials.

(citations omitted).

Employing the facial implication doctrine here shows that Bell's statement, as redacted, did not name Gray as a participant to the crime, nor did it contain any other reference that readily and unmistakably identified the person referred to as Gray. Because the statement itself did not name or otherwise identify Gray, nor alone serve to connect him with the crime, it was not the type of "facially incriminating" statement contemplated by *Bruton* and *Richardson* and its progeny.

Bell's statement was not facially incriminating of Gray for the additional reason that it implicated five other, unnamed individuals in the commission of the crime

for which he was on trial, any two of whom could have been the persons referred to in the statement as "deleted" and "deletion." Because Bell's statement indicated that five individuals besides Bell participated in the crime, the unnamed entities could have been any of those five persons and did not automatically compel the conclusion that Gray was among them. Numerous courts follow this line of reasoning. *See, e.g. United States v. Washington*, 952 F.2d 1402, 1404-05 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 1009 (1992); *United States v. Donahue*, 948 F.2d 438, 444 (8th Cir. 1991), *cert. denied*, 503 U.S. 976 (1992); *United States v. Briscoe*, 896 F.2d 1476, 1502 (7th Cir.), *cert. denied*, 498 U.S. 863 (1990); *Harris v. State*, 462 S.E.2d 425 (Ga. 1995); *Commonwealth v. Rawls*, 419 A.2d 109, 112-13 (Pa. Super. 1980).

In short, the redacted statement in the instant case created no substantial risk that the jury would consider the statement in deciding the guilt of Gray. Gray was neither identified in the statement nor was he the only other participant in the charged crime so as to make his name the only possible substitution for the word "deleted." Any of the deleted names could have been replaced with the names of, or some other references to, the five other individuals who were at the scene and who participated in the beating of the victim. Bell's

statement, although it tended to implicate Gray when viewed in conjunction with other evidence, did not directly or expressly implicate Gray, and that is all that *Bruton* requires.

"The 'rule—indeed, the premise upon which the system of jury trials function under the American judicial system—is that juries can be trusted to follow the trial court's instructions." *Parker v. Randolph*, 442 U.S. 62, 75 n.7 (1979). As this Court observed in *Richardson*, 481 U.S. at 208, when a confession is only inferentially incriminating, as was the case here, limiting instructions by the trial court are especially likely to be successful in precluding the jury from inferring the guilt of the defendant from the co-defendant's confession. Here, the trial court's instructions to the jury to consider Bell's statement as evidence only against Bell, not Gray, are presumed to have been effective in preventing the jury from improperly inferring Gray's guilt from the confession of his codefendant.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that the petition for writ of certiorari filed herein be denied.

Respectfully submitted,

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May 12, 1997

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Re: *Kevin D. Gray v. State of Maryland*
No. 96-8653

Dear Mr. Suter:

I enclose herewith for filing in the above-referenced case an original and ten copies of the Brief in Opposition, together with the required Certificate of Service. Copies of this letter and the enclosures have been served on all parties. Should any questions arise, please contact me at the above address or telephone number.

Very truly yours,

Gary E. Bair
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Petitioner,	*	SUPREME COURT
v.	*	OF THE UNITED STATES
STATE OF MARYLAND	*	October Term, 1997
Respondent.	*	No. 96-8653

* * * * *

CERTIFICATE OF SERVICE

I, GARY E. BAIR, a member of the Bar of this Court, hereby certify that on the 12th day of May, 1997, two copies of the Brief in Opposition to the Petition for Writ of Certiorari in the above-captioned case were served by hand-delivery on counsel for Petitioner, George E. Burns, Jr. and Arthur A. DeLano, Jr., Assistant Public Defenders, 6 Saint Paul Street, Suite 1302, Baltimore, Maryland 21202-1608, (telephone: (410) 333-3194). I further certify that all parties required to be served have been served.

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